No. 10974

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

E. J. HEBETS,

Appellant,

vs.

BENSON G. SCOTT,

Appellee.

APPELLANT'S REPLY BRIEF

HILL, ROBERT & HILL
Attorneys for Appellant
310 Luhrs Tower
PHOENIX, ARIZONA

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SUMMARY

Appellee admits that a contract binding under the Statute of Frauds may be gathered from letters, writings and telegrams between the parties. He admits that the Statute of Frauds is merely a rule of evidence and that a contract will be construed if it may consistently be done to be effective rather than ineffective under the Statute of Frauds. He admits that all that is necessary to take a contract out of operation of the Statute of Frauds is that the essential elements of the contract be expressed in writing and signed by the party to be charged.

By not bothering to trace the derivation of the provision of the Statute of Frauds which he has invoked here, he admits that such Statute was lifted from California and that the Statute, as construed by the courts of California, will govern in Arizona.

He argues that there is no distinctive construction in California of the Statute here invoked in its application to the facts.

He argues that the correspondence between the broker and owner is nothing more than a proposal by a broker to an owner that he act as the owner's agent and he cites two Oregon cases to support this view.

He argues that the Appellant has shifted his position from reliance on an express authorization in writing to sell, to that of a "conditional employment subject to Appellee's approval".

The California Decisions

Appellee says of this Statute: "No distinctive construction in California" has been pointed out "and our examination of California decisions discloses none". (Brief 4). Then later (Brief 18) he discusses the case of Curran vs. Hubbard, 114 Pacific 81, a California case which was cited and quoted from by Appellant. He dismisses this case with the statement that,

> "Obviously, it goes far beyond anything set down by this Appellee. Owner Hubbard did not

> preface his direct solicitation of an offer with a disclaimer of any desire to sell. Nor did he add that, on receipt of an offer, he would try to work out a deal."

What legal difference there is, between a listing given after solicitation and one given without solicitation we fail to see and Appellee fails to point out. The important thing is: was there a listing, was there an authorization from the owner to the broker to negotiate a sale?

His distinction is far f e t c h e d and weak when it is analyzed. Appellee relies upon a disclaimer of a desire to sell made February 4, 1942 (T. 15) some 15 months prior to the time he acknowledged that Appellant was his broker, in May and July, 1943 (T. 25 and 30) and after an offer of $90,000 had been submitted to and rejected by him (T. 21 and 22) and after other deals had been submitted in August and September, 1943 (T. 33, 36, 39 and 40) to which he replied:

> "The trade your party has sounds as if I might want it, but again, I can make no decision until I see it (T. 44).

Appellee knew for over 18 months after he had disclaimed a desire to sell, that Appellant, had, at his request for offers, been devoting time and effort to the sale of the property and yet he now has to go back to the disclaimer to find a distinction between this case and the case of Curran vs. Hubbard (Supra).

There is no distinction between the two cases. The important thing in the Curran vs. Hubbard case (Supra) as stated by the court is:

> "defendant * * * by the words 'get me an offer' used in the memorandum delivered to plaintiff, intended to and did authorize and employ him to find someone to whom a sale or satisfactory exchange could be made. Any other interpretation would be meaningless". 114 Pacific, page 82.

Here Appellee wrote Appellant "if you have a buyer definitely intested and willing to pay the market price for it, *let me have an offer*, that is, a business one" (T. 15); again "I shall be over soon; at which time I will look you up. In the meantime if you have a deal that you think will interest me, *let me know* (T. 17); again "if you should develop something that is a deal, *shoot me a letter on it*" (T. 30 and 31); and again "if you have the deal ready to close I will cut my time in the San Joaquin as short as possible and get there a few days earlier. *Write me a line* at this address and they will send it on up to me, or better still send it to my Visalia address". (T. 44) (Italics Ours).

In the Curran vs. Hubbard case (Supra), there was only one request from the owner to the broker to obtain an offer; here there are three such requests and in addition a request that he be kept advised of the progress of the negotiations that he knew were in progress. Indeed, the facts here are much stronger than they were in the Curran vs. Hubbard case.

Appellant also cited and quoted from the case of Kennedy vs. Merickel 97 Pacific 81. That is a California case which construes the Statute invoked here. It unmistakably holds that:

> "A writing signed by the owner and addressed to the broker expressly or impliedly acknowledging his authority to act as agent for the purpose of the sale is a sufficient compliance with the statute". 97 Pacific 82 and 83.

Appellee completely dodges this case, obviously because its holding is u n a n s w e r a b l e. Appellee in his letter of May 31, 1943 (T. 25) states: "I might be able to work out a combination deal on it, that is, if you sell my other place". On July 7, 1943 (T. 30) he said "I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decided to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind."

In spite of Appellee's feeble effort on page 9 of his brief to make this language into something different from what it actually is, it still means exactly what it says. It is an unqualified acknowledgment that the Appellant was the Appellee's broker for the purpose of selling the property and a promise that he would not terminate the agency without giving the broker a chance to work out any deals he may have been working on. This alone, under the rule of Kennedy vs. Merickel (Supra), is sufficient memorandum to meet the requirements of the Statute.

Appellee has overlooked or disregarded the case of McCartney vs. Clover Valley Land and Stock Company (C. C. A. 8th) 232 Fed. 697 which is cited on pages 9 and 23 of Appellant's Brief and quoted from on the latter page. In that case the Court stated in regard to the California statute:

> "all that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent."

Appellee has also overlooked in his search of the California cases Toomey vs. Dunphy 86 Cal. 639 25 Pac. 130 and Moore vs. Borgfeldt 96 Cal. App. 306, 273 Pac., 1114. These two cases are cited and the latter is quoted from in the case of Morrill vs. Barneson 86 Pac. 2nd 924, which is the only California case Appellant cites and quotes from (Brief 18, 19, and 20).

In the first of these cases, Toomey vs. Dunphy, the writing under consideration was.

> "Henry Toomey can arrange for the sale of my ranch in Nevada as per within memorandum".

This language was held to express the fact of employment and sufficient to meet the requirements of the Statute.

In the second case, Moore vs. Borgfeldt (Supra), the following quotation is taken from that case and appears in the opinion of Morrill vs. Barneson (which is the case relied on by the Appellee):

> "As we have pointed out, the writing need not be a complete contract, but only a note or memorandum, provided it shows authority to act. When this requirement is met in connection with a definite piece of property, the other terms may be shown by parol. The amount of compensation, and even an agreement to pay a commission, may be so shown." 86 Pac. 2nd 927.

The best distinction between the holding of the case of Morrill vs. Barneson (which is the California case Appellee relies on) and this case is that made by the court itself. It is stated on page 927 of the opinion;

> "Several cases have been cited to us by Appellant, but it is not necessary to review the same. *The cases expressly request the agent to get an offer.* It is well settled that a memorandum to be sufficient under the Statute of Frauds must show an authority to act, i.e., authority to negotiate a sale on defendant's behalf. If such authority appears, then the identity of the agent, and even the agreement to pay him, may be shown by parol". (Italics Ours).

In that case, Barneson, the owner, did not request Morrill to obtain an offer for his ranch. Here there are three such requests.

The Correspondence Is More Than a Mere Solicitation

In support of his proposition that the correspondence constitutes nothing more than a solicitation by a

broker for authority to act as such, Appellee relies upon two Oregon cases, Henry vs. Harker 61 Ore. 226, 122 Pac. 298, and Great Western Land Company vs. Waite 171 Pac. 193 first opinion 168 Pac. 927.

In the first of these cases the question of whether or not the correspondence was sufficient to meet the requirements of the Oregon Statute of Frauds was neither raised as a defense nor determined by the court. The case was decided on the proposition that the broker had not earned his commission because he had not sold the property in accordance with the terms prescribed by the owner or with the approval of the owner.

The very fact that the Statute of Frauds was not urged as a defense is conclusive that both parties and their counsel were of the opinion that the writings were sufficient to take the agreement out of the operation of the Oregon Statute of Frauds, of which the Oregon court has said "it is the most drastic of its kind in the United States". Great Western Land Company vs. Waite 168 Pac. 927 (which is the other Oregon case Appellee relies on).

That case has no application here because it did not decide the question involved and because the Oregon Statute is vastly different from the Arizona Statute.

The other Oregon case, Great Western Land Company vs. Waite, (Supra) is clearly distinguishable; there the broker,

"approached the owner in the character of a buy-

ing broker and agent acting and purporting to act for a party not disclosed. There is nothing in the writings on either side showing that the dedefendant ever assented to any change of front on the part of plaintiff". 171 Pac. 194.

The above quotation appears on page 22 of Appellee's Brief. Here the whole correspondence indicates conclusively that the broker was carrying out the repeated requests of the owner to obtain offers for the purchase of his property from anyone the broker could get an offer from.

In this latter Oregon case the correspondence contains no request by the owner to the broker to obtain offers of purchase for his property. The owner merely wrote the broker as to the terms on which he would sell and agreed to protect the broker in the sale for anything over $15.00 net per acre to the owner. There is nothing in the correspondence where the owner acknowledged the broker as his agent. The case is further distinguishable on the basis that the Oregon Statute is "the most drastic of its kind in the United States" and completely different from the Arizona Statute.

Has Appellant Shifted His Theory?

Appellee overlooks no opportunity to accuse the Appellant of having shifted his position and changed his theory of this case.

Again and again, Appellee attempts to brand the Appellant with abandonment of his original theory

and a reversal of his position. He states (Brief 4) "and his counsel, in closing his brief, interpret the writings as comprising, at most, a conditional agreement, far from the one alleged in their amended complain". On page 6 he states "After alleging an express agreement of employment, and a promise to pay a 5% commission, and arguing, for 22 pages, that isolated passages * * * * establish one, they conclude with a reversal of position, amounting to a plain confession of error". On page 1 he states "Down to the penultimate page of his brief, the entire position of Appellant is that Appellee had expressly authorized him, in writing, to sell his property on specified terms for a 5% commission. Then it is suddenly conceded that the prerequiste agreement in writing was only an authorization to submit a deal for Appellee's approval". On page 17 he states "Manifestly, it was their inability to find, in all the writing producible, any support for the promise or agreement they had pleaded and argued to the last page of their brief, which led them, at the end, to abandon the position and fall back on a nebulous authorization to submit a deal for Appellee's approval" and again on the same page "Having pleaded and proceeded to the end of his brief on one theory, Appellant may not then shift to another" and again on page 17 and continuing on page 18, "But to sustain the summary judgment rendered below, it is only necessary to point out:

1. That the employment pleaded is admittedly not shown in writing, and

2. That the conditional employment 'subject to the

> Appellee's approval' was not pleaded, relied upon, or even conceived, until the first contention proved itself untenable."

This is rather strong language and a serious accusation, if correct. On the other hand, if it is not substantiated by the record, then it must be an attempt to obscure the issues so as to permit Appellee to escape through a "hole in the fence" in the confusion.

Appellant alleged in his amended complaint that "plaintiff was employed by defendant to procure a purchaser for real estate owned by defendant" * * * * and "in consideration thereof defendant promised and agreed to pay plaintiff * * * * a commission." That "a memorandum of such promise and agreement upon which this action is brought was in writing and signed by defendant" * * * * that "plaintiff negotiated the sale of said land" * * * * "upon the terms and conditions fixed and agreed upon by the defendant" * * * * that the purchaser procured by the plaintiff was willing, ready and able to complete the purchase of defendant's real estate upon the terms and conditions fixed and agreed upon by the defendant; that the plaintiff performed all the conditions of the contract and that the defendant refused to pay him the commission. (T. 6 and 7).

If Appellee was misled into believing that he was being sued upon an express formal agreement; he could not have been long in the dark. All of the correspondence was made available to the Appellee under

an order of the court on May 22, 1944. (T. 56) and he attached all of it to his motion for a summary judgment. (T. 13). With all of the evidence on which Appellant relied to establish a sufficient memorandum to take the agreement out of the operation of the Statute of Frauds in his hands; there could be no doubt in Appellee's mind as to what he was being sued for or as to the position or the theory of the Appellant.

Certainly had there been a formal written agreement, Appellant would have sued upon that agreement and not upon an agreement, a memorandum of which was in writing and signed by Appellee. Had such a formal written agreement existed the Appellee could not have claimed immunity because of the Statute of Frauds.

Too, it appeared from the correspondence that at least one offer had been submitted to Appellee for the purchase of property and that the Appellee had turned the offer down. (T. 21 and 22). In addition to this it appears that Appellant telegraphed and wrote Appellee that he had a proposition (T. 35 and 36) to which Appellee replied on September 3, 1943 he would be over next week (T. 38). Again on September 20th Appellant advised Appellee by letter (T. 39) that he had signed up a client on a trade agreement and that the client would be interested in buying even if Appellee didn't want to trade, that "there is a deal either way if taken care of in time", and later

he telegraphed Appellee that he had a definite deal signed up "if trade not suitable, will arrange deal cash or terms as required by you". (T. 40) to all of which Appellee replied (T. 44) "the trade your party has sounds as if I might want it, but again I can make no decision until I see it".

With all of this correspondence before him, it is difficult to understand how the Appellee or his counsel could misunderstand the plaintiff's theory of this case. Appellant's position is now and always has been as it was originally: that the Appellee employed the Appellant to act as his broker to obtain an offer of purchase for his property that would be satisfactory to him; that Appellant did this and that Appellee after accepting the offer went back to California and refused to go through with the deal he had made.

There is nothing strange, mysterious or unusual about an owner employing a broker to obtain an offer for his property which is subject to the owner's approval and acceptance. If the broker, under such an employment, produces a purchaser whose offer is accepted by the owner, then certainly the broker has earned his commission. That is, and always has been, the Appellant's theory. The appellee has known all along that, that was the theory of Appellant's case. The record shows it has not been changed or shifted.

This leaves only two matters we desire to briefly cover.

First: we challenge Appellee's definition of "a listing", (Brief 5) and in support of this challenge cite

the cases of Zeligson vs. Hartman-Blair, Inc. (C. C. A. Kan.) 135 Fed. 2nd 874 and Wiggam vs. Shouse (Kan.) 185 Pac. 896.

Second: Appellee fails to make good on his promise "to discuss the term 'gentlemen's agreement' and what the courts have made of it". (Brief 6). We understand that it is an agreement between gentlemen. We understand gentlemen are men of honor and integrity. They are men who in their dealings with others can honestly state "and Morse get this straight no one ever worked on my affairs, or did me a favor that he didn't get just compensation for it" (T. 44). Morse was certainly mistaken when he took the agreement with Appellee for a "gentlemen's agreement" (T. 50).

It is respectfully submitted that this case should be reversed.

HILL, ROBERT & HILL,

By ROULAND W. HILL
Attorneys for Appellant
310 Luhrs Tower
Phoenix, Arizona.